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**FILED**  
**YOLO SUPERIOR COURT**

JUN 24 2009

By

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 MARCO ANTONIO TOPETE

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF YOLO**

THE PEOPLE OF THE STATE OF

CALIFORNIA,

Plaintiff,

vs.

MARCO ANTONIO TOPETE,

Defendant.

) Case No.: 08-3355

) **DEFENDANT'S OPPOSITION TO THE**  
 ) **PEOPLE'S MOTION TO COMPEL**  
 ) **DEFENDANT TO PROVIDE**  
 ) **HANDWRITING EXEMPLARS**

) Date: August 7, 2009

) Time: 9:00 a.m.

) Dept: 2

**INTRODUCTION**

In determining that the requested handwriting exemplar is a non-testimonial, identifying physical characteristic, the prosecution relies on *Gilbert v. California* (1966) 384 U.S. 757, a case evaluating the admissibility of a handwriting exemplar which the defendant provided to law enforcement voluntarily. The defendant has made no such offer here. The prosecution's reliance on *U.S. v. Dionisio* (1973) 410 U.S. 1 (dictum); *U.S. v. Mara* (1973) 410 U.S. 19; *U.S. v. Euge* (1980) 444 U.S. 707; and *People v. Paine* (1973) 33 Cal.App.3d 1048 is misplaced given the standards set by *Schmerber v. California* (1966) 384 U.S. 757. The prosecution avoids the

1 central issue by relying on these cases in which the purpose and content of the requested  
2 handwriting exemplar was made with sufficient specificity so as to determine whether the Fourth  
3 or Fifth Amendments applied. Here, the prosecution has made no such showing and presupposes  
4 those facts which are critical to the court's evaluation of their motion.

## 6 7 **ARGUMENT**

### 8 Fourth Amendment

9 The request made by the prosecution implicates the Fourth Amendment protection  
10 against unreasonable search and seizure. Handwriting exemplars have been held to be a seizure  
11 under the Fourth Amendment and therefore subject to the requirements of a showing of probable  
12 cause. (See e.g. *Davis v. Mississippi* (1969) 394 U.S. 721; *United States v. DePalma* (9th Cir.  
13 1969) 414 F.2d 394, cert. denied, 396 U.S. 1046; *Dionisio v. United States* (7th Cir. 1971) 442  
14 F.2d 276; *People v. Sesslin* (1968) 68 Cal.2d 418, 428; *People v. Gormley* (1944) 64 Cal.App.2d  
15 336, 340.)

16 Although the case law regarding the Fourth Amendment requirements for requesting  
17 handwriting exemplars is somewhat sparse, the Central District of California has provided some  
18 guidance:

19 "In the context of a request for handwriting exemplars, this means, at the least, that the  
20 government must demonstrate in its motion that probable cause exists to believe the  
21 defendant was involved in a substantive violation of the law in which his handwriting  
22 played a part. It would not be sufficient, on the other hand, to show merely that a  
23 handwriting exemplar would be helpful to the preparation of the government's case or  
24 that it might be relevant to the investigation of other crimes in which the defendant's  
25 involvement is suspected."

26 (*U.S. v. Praigg* (D.C. Cal. 1972) 336 F.Supp. 480, 484.)

27 Therefore, at a minimum, the Fourth Amendment requires that the prosecution's request  
28 for a handwriting exemplar specify exactly what type or types of exemplars are being sought and  
what evidence or element the prosecution seeks to use the exemplars to prove. The prosecution  
must provide this information so that the court can determine if probable cause has been shown  
to justify each requested exemplar and if the request is unreasonably burdensome or excessive.

1 If, for example, the request related to an uncharged offense or enhancement, a showing of  
2 probable cause as to that offense or enhancement would be necessary. Likewise, if the  
3 prosecution seek voluminous exemplars or already has sufficient exemplars in the evidence  
4 already seized, the court may find that the request is unreasonably burdensome or excessive.

5       Regardless, a general order directing the defendant to furnish any and all exemplars or, as  
6 the prosecution describes them, "sufficient examples" would be in violation of the Fourth  
7 Amendment.

#### 8       Fifth Amendment

9       As to the Fifth Amendment rights implicated by the prosecution's request, we are once  
10 again unable to appropriately characterize the request, and therefore the right involved, without  
11 additional specificity as to the purpose and scope of the requested handwriting exemplars.  
12 Indeed, the court in *Schmerber v. California* clearly considered, and left open, the possibility  
13 that some requests for handwriting exemplars are testimonial and, therefore, fall outside its  
14 ruling in that case:

15               There will be many cases in which such a distinction is not readily drawn. Some  
16 tests seemingly directed to obtain "physical evidence," for example, lie detector  
17 tests measuring changes in body function during interrogation, may actually be  
18 directed to eliciting responses which are essentially testimonial. To compel a  
19 person to submit to testing in which an effort will be made to determine his guilt  
20 or innocence on the basis of physiological responses, whether willed or not, is to  
21 evoke the spirit and history of the *Fifth Amendment*. Such situations call to mind  
22 the principle that the protection of the privilege "is as broad as the mischief  
23 against which it seeks to guard"

24 (*Schmerber v. California* (1966) 384 U.S. 757, 764 (citing *Counselman v. Hitchcock* (1892) 142  
25 U.S. 547, 562); see also *People v. Paine* (1973) 33 Cal.App.3d at 1050 (citing *U.S. v. Mara*  
26 (1973) 410 U.S. at 22, footnote); *People v. Ellis* (1966) 65 Cal.2d 529, 538.)

27       As *Schmerber* makes clear, it is of paramount importance in considering whether or not  
28 compelling a defendant to provide handwriting exemplars violates the Fifth Amendment to  
determine the purpose of the request and the nature of the exemplar sought. If, for example, the  
prosecution is seeking a handwriting exemplar of a response to a question which, if spoken,  
would be violative of the Fifth Amendment, then the written response is similarly testimonial

1 and communicative. Likewise, if the purpose of requesting the exemplar goes to the corpus of  
2 one of the charged offenses or enhancements, the handwriting exemplar in this case may cross  
3 over the expanse defined by *Schmerber*.

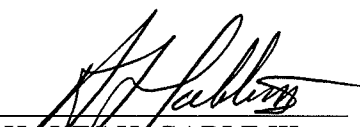
4 Although the prosecution's request may be "relevant" to the prosecution's case,  
5 *Schmerber* warns that there is a vast variety of handwriting exemplar requests which may  
6 annihilate the distinction between physical evidence and testimonial communication.

### 7 CONCLUSION

8 Without sufficient particularity as to the writings that have been seized, for what purpose  
9 those writings are sought to be entered into evidence, and the content of the requested  
10 handwriting exemplars, it is impossible to determine whether the request is reasonable under the  
11 Fourth Amendment or qualifies as testimonial communications of the sort barred by the Fifth  
12 Amendment. (*DePalma* (9th Cir. 1969) 414 F.2d 394, cert. denied, 396 U.S. 1046; *Schmerber*  
13 (1966) 384 U.S. at 764).

14 The danger of deciding the issue without a detailed accounting of the evidence leading to  
15 the request and the intended content of the writings is at its most critical level where, as here, a  
16 capital offense is alleged. A mere cursory recitation of the broad landscape of handwriting  
17 exemplar case law is insufficient to establish the reasonableness of the seizure or the scope of the  
18 self-incrimination where a violation of the defendant's constitutional rights could result in his  
19 execution.

20 Dated: June 22, 2009

  
HAYES H. GABLE III  
Attorney for Defendant  
MARCO ANTONIO TOPETE

## CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 428 J Street, Suite 350, Sacramento, California 95814.

On the date below, I served the following document(s):

**DEFENDANT'S OPPOSITION TO THE PEOPLE'S MOTION TO COMPEL  
DEFENDANT TO PROVIDE HANDWRITING EXEMPLARS**

(X) BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

YOLO COUNTY DISTRICT ATTORNEY  
301 Second Street  
Woodland, CA 95695


() BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the offices of the person(s) listed below:

() BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

() BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 23, 2009, at Sacramento, California.

  
\_\_\_\_\_  
Declarant